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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

Conservatorship of the Person of KATRINA C.	B292159 (Los Angeles County Super. Ct. No. ZE039508)
CAROLINA TOSCANO, as Conservator, etc., Petitioner and Respondent, v. KATRINA C., Objector and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Robert Harrison, Judge. Affirmed.

Rudy Kraft, under appointment by the Court of Appeal, for Objector and Appellant.

Gerald J. Miller, under appointment by the Court of Appeal, for Petitioner and Respondent.

Katrina C. appeals from a conservator reappointment order issued pursuant to the Lanterman-Petris-Short Act (LPS Act; Welf. & Inst. Code, § 5350 et seq.). We hold that by failing to object when the conservator called Katrina to testify at her conservatorship trial, Katrina forfeited her claim that the trial court violated her equal protection right not to testify.[1] Moreover, the failure of Katrina's trial counsel to object was not ineffective assistance of counsel; the fact that counsel reasonably could have wanted Katrina to testify provided a satisfactory explanation for the failure. We also conclude that the trial court did not violate Katrina's psychotherapist-patient privilege by allowing her treating psychiatrist to testify. During trial, the conservator expressly authorized the psychiatrist to testify "as to the patient information [the psychiatrist had]" regarding Katrina, thus waiving the privilege by consenting to the disclosure of any privileged communication. We reject Katrina's claim that the conservator lacked authority to waive the privilege because the conservator and Katrina were opposing parties. Trial counsel's failure to object to the testimony was therefore not ineffective assistance. We affirm.

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[1] In her opening brief, Katrina claimed she had statutory (Welf. & Inst. Code, § 5303) and equal protection rights not to testify; in her reply brief she abandons her statutory claim.

BACKGROUND

I. Preliminary Facts

In February 2018, Carolina Toscano filed a petition seeking reappointment as the conservator for Katrina, Toscano's daughter, on the ground that Katrina was gravely disabled as a result of a mental disorder. The court appointed attorney Karl Fenske to represent Katrina. On August 1, 2018, Katrina personally waived her right to a jury trial.

At the August 2, 2018 court trial, Toscano, through her counsel John Uribe, called Katrina as the first witness, asking permission to treat her as a hostile witness. Katrina asked if her parents could "go first." The court explained Uribe was calling Katrina first; she replied, "Thank you."

II. The Conservatorship Trial

A. *Katrina's Testimony*

Katrina testified as follows: Katrina was 24 years old. At 18, she admitted herself to a hospital's mental ward, stating she suffered from schizophrenia and depression. Doctors diagnosed her with schizoaffective disorder. Katrina disagreed with the diagnosis.

Katrina told her treating physician, Dr. Sandra Aquino, that she did not want to be a conservatee. She also told Dr. Aquino that she was fine, ready to be on her own, and did not feel she needed medications anymore. In Katrina's last session with Dr. Aquino, Katrina and her parents discussed her medications.

Katrina intended to "save up [money] for the gym because [she] always wanted to be a [M]arine." She had no other plans. Katrina complained that her parents were harassing her, would

not "let [her] out," and she had no freedom. She denied seeing a monkey on an avocado.

B. *Dr. Aquino's Testimony*

Dr. Aquino, a psychiatrist, testified as follows: Dr. Aquino had seen Katrina approximately monthly as her treating psychiatrist since February 2018. Dr. Aquino had reviewed Katrina's medical records and had consulted with Katrina's other treating psychiatrists. Dr. Aquino diagnosed Katrina with schizoaffective disorder, consistent with Katrina's previous diagnosis. When Dr. Aquino began seeing Katrina, Katrina exhibited symptoms of hallucinations with paranoid delusions and mania. Katrina sometimes answered questions tangentially. For a time, Katrina told Dr. Aquino that she had been seeing monkeys. Katrina also reported hearing things.

Dr. Aquino assessed Katrina's judgment during treatment sessions. Katrina lacked the capacity to make sound, reasonable, and responsible decisions concerning her care and safety "when she goes out of the house," and she exhibited poor judgment. When Dr. Aquino referred to Katrina exiting the house, Dr. Aquino referred to Katrina's self report to Dr. Aquino that on one occasion Katrina left the house at 3:00 a.m. and "disappeared."

Based on Dr. Aquino's sessions with Katrina and observations of Katrina during her testimony, Dr. Aquino opined that Katrina's mental illness rendered her gravely disabled and her mental disorder would interfere with her ability to provide for her basic food, shelter, and clothing needs. Dr. Aquino opined that based on Katrina's current mental health condition, she would be unable to care for herself in the community absent a conservatorship and Toscano's care. Toscano was providing

Katrina's food, shelter, and clothing, and the means by which she could attend medical appointments.

Katrina gave conflicting statements to Dr. Aquino about whether she would take prescribed psychotropic medication and mood stabilizers. Given Katrina's lack of insight concerning her illness, failure to understand treatment benefits, and "her past hospitalizations . . . for noncompliance of medication and being in a locked facility for nine months," Dr. Aquino thought Katrina would be unwilling to take her medication absent a conservatorship.

C. *The Court's Reappointment of Toscano as Conservator*

Following this testimony, the court asked if the parties submitted the matter. Fenske stated yes; he would "submit on [Katrina's] stated plan in her testimony."

The court told Katrina that "I heard what you want. I know what you want, that you would like to have your freedom." The court continued: "But at this point, . . . based on what you've told me and what doctors told me, that doesn't sound like it's a good idea. You need that extra support of your parents to make sure that you're taking your medications, that you get your food, clothing and shelter and that you get stronger. And one day you will be able to be on your own. The court is concerned . . . that . . . you're at a certain level that hasn't changed much. You still have some symptoms and . . . that makes you somewhat frustrated." The court reappointed Toscano as conservator.

DISCUSSION

I. Katrina Forfeited Her Equal Protection Claim

Katrina claims she had the right not to testify, and the trial court violated her right to equal protection by permitting the conservator to call her as a witness. Katrina argues a conservatee is similarly situated to defendants found not guilty by reason of insanity (NGIs), sexually violent predators (SVPs), and mentally disordered offenders (MDOs) enjoying that right in their respective civil commitment proceedings, and disparate treatment of a conservatee does not pass the strict scrutiny test. She further argues the violation was prejudicial.

"The LPS Act governs the involuntary detention, evaluation, and treatment of persons who, as a result of mental [health] disorder, are dangerous or gravely disabled. [Citation.] The Act authorizes the superior court to appoint a conservator of the person for one who is determined to be gravely disabled [citation], so that he or she may receive individualized treatment, supervision, and placement [citation]. As defined by the Act, a person is 'gravely disabled' if, as a result of a mental [health] disorder, the person 'is unable to provide for his or her basic personal needs for food, clothing, or shelter.' [Citation.]" (*Conservatorship of John L.* (2010) 48 Cal.4th 131, 142.)

If a person is found to be gravely disabled and a conservatorship is imposed, the "conservatorship automatically terminates at the end of a year. [Citation.]" (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 542.) "[T]he conservatorship may be extended for additional one-year periods, so long as the person remains gravely disabled. [Citation.]" (*Id.* at p. 540.) "At a hearing to reestablish a conservatorship after its automatic

expiration, the standard of proof beyond a reasonable doubt and the rights to appointed counsel, to a court or jury trial, and to a unanimous jury verdict . . . apply. [Citations.]" (*Id.* at p. 542.)

In *Hudec v. Superior Court* (2015) 60 Cal.4th 815, the court held that an NGI has a statutory (Pen. Code, § 1026.5, subd. (b)(7)) right not to testify at a state hospital commitment extension hearing. (*Hudec*, *supra*, at p. 818.) *People v. Curlee* (2015) 237 Cal.App.4th 709 held that for equal protection purposes, SVPs are similarly situated to NGIs regarding the right not to testify, although the court remanded the case for a hearing on whether disparate treatment was justified. (*Id.* at pp. 712, 720-722; see *People v. Landau* (2016) 246 Cal.App.4th 850, 864-865.) *People v. Dunley* (2016) 247 Cal.App.4th 1438 held that MDOs are similarly situated to NGIs and SVPs for purposes of the right not to testify, and a compelling state interest for differential treatment had not been shown. (*Id.* at pp. 1443, 1447-1450, 1453, fn. 14; see *People v. Alsafar* (2017) 8 Cal.App.5th 880, 887.)

NGI proceedings are necessarily related to an alleged crime. An SVP has suffered a conviction for a qualifying sexually violent crime. (*People v. Curlee, supra*, 237 Cal.App.4th at p. 712.) An MDO has been convicted of a qualifying violent crime. (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1122.) LPS conservatorships are not necessarily related to an alleged crime. (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 546, 548-549 (*Baber*).) However, NGI, SVP, and MDO commitment proceedings, as well as conservatorship proceedings, are not criminal but civil in nature. (*Conservatorship of Ben C.*, *supra*, 40 Cal.4th at p. 537 [re conservatees]; *People v. Yartz* (2005) 37 Cal.4th 529, 535-536 [re SVPs]; *People v. Powell* (2004) 114

Cal.App.4th 1153, 1157, 1159 [re NGIs and MDOs], disapproved on other grounds in *People v. Tran* (2015) 61 Cal.4th 1160, 1189 and *Hudec v. Superior Court*, *supra*, 60 Cal.4th at p. 828, fn. 3.)

The problem here is that Katrina raises the equal protection issue for the first time on appeal. " ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 590; see *People v. Barnum* (2003) 29 Cal.4th 1210, 1224-1225, fn. 2 [forfeiture doctrine applies to constitutional privilege against compelled self-incrimination]; *People v. Carpenter* (1997) 15 Cal.4th 312, 362 [forfeiture doctrine applies to equal protection claim].)

We reject Katrina's argument that raising the issue in the superior court would have been futile because *Baber* held that a prospective conservatee can be required to testify. *Baber* concluded that neither the Fifth Amendment privilege against self-incrimination nor a person's fundamental liberty interest (implicating substantive due process) provides a basis for a prospective conservatee's alleged right not to testify at a conservatorship trial. (*Baber*, *supra*, 153 Cal.App.3d at pp. 546, 548-550, 554.) *Baber* stressed the differences between conservatorship and *criminal* proceedings, concluding they were not analogous. (*Id.* at pp. 548-550.)

Katrina's equal protection claim is different; it is not based on the privilege against self-incrimination or due process. Instead, it is based on equal protection and case law holding SVPs and MDOs *are* similarly situated with respect to NGIs who

enjoy a right not to testify, even though proceedings involving the three groups are *civil* in nature. The analysis therefore requires consideration of whether conservatees (like SVPs and MDOs) are similarly situated with respect to the legitimate purpose of the LPS Act, and whether disparate treatment of conservatees is justified under the strict scrutiny test. (See *People v. Green* (2000) 79 Cal.App.4th 921, 925.)

We therefore hold Katrina forfeited her equal protection claim by failing to raise it in the superior court.

II. Fenske Did Not Provide Ineffective Assistance of Counsel by Failing To Raise the Equal Protection Issue

We also reject Katrina's claim that Fenske provided ineffective assistance of counsel by failing to object that she had an equal protection right not to testify. " 'To establish ineffective assistance of counsel, [an appellant] must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the [appellant].' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980.) On appeal, we " 'defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] [The appellant's] burden is difficult to carry on direct appeal . . . : " 'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal *affirmatively*

discloses that counsel had no rational tactical purpose for [his or her] act or omission.' " [Citation.]' [Citation.] If the record on appeal ' " 'sheds no light on why counsel . . . failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or *unless there simply could be no satisfactory explanation*,' the claim on appeal must be rejected" ' . . . . [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 871-872, italics added, overruled on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 104-105.)

" 'Judicial scrutiny of counsel's performance must be highly deferential. . . . [I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . [T]he [appellant] must overcome the presumption that, under the circumstances, the challenged action "*might* be considered sound trial strategy." [Citation.]' [Citation.]" (*In re Valdez* (2010) 49 Cal.4th 715, 729-730, italics added.) Where "a valid possible explanation" exists for counsel's alleged failure, the appellant "has failed to establish ineffective assistance of counsel." (Cf. *People v. Diaz* (1992) 3 Cal.4th 495, 563.)

Katrina testified to the effect she did not need a conservator. She testified that the diagnosis of schizoaffective disorder was erroneous, she was fine, she did not need medications, and Toscano was harassing her. Katrina also testified that her plan for the future was to save money for the gym, and she wanted to be a Marine. Fenske submitted the matter "on [Katrina's] stated plan in her testimony."

The record sheds no light on why Fenske failed to object to Katrina testifying; Fenske did not fail to provide an explanation after being asked for one. However, Fenske reasonably could

have failed to object because he believed Katrina needed to present such testimony, including her "stated plan," to counter Dr. Aquino's testimony. That plan included Katrina's becoming a member of the armed forces, which would have addressed "her basic personal needs for food, clothing, [and] shelter." (*Conservatorship of John L.*, *supra*, 48 Cal.4th at p. 142.) This was a satisfactory and valid possible explanation for Fenske's failure. Thus, Katrina has not shown that ineffective assistance of counsel occurred. (*People v. Vines*, *supra*, 51 Cal.4th at pp. 871-872; *People v. Diaz*, *supra*, 3 Cal.4th at p. 563.)

III. The Trial Court Did Not Violate Katrina's Psychotherapist-patient Privilege by Allowing Dr. Aquino To Testify

Katrina claims the trial court violated her psychotherapist-patient privilege by allowing Dr. Aquino to testify, because the conservator, as the opposing party, "cannot be given the authority to waive privileges on behalf of a conservatee in order to extend [the conservator's] authority to control the conservatee's life." We reject Katrina's claim.

A. *Additional Pertinent Facts*

After Dr. Aquino was sworn at trial, she stated the Department of Mental Health was asserting the psychotherapist-patient privilege as to confidential communications between her and Katrina. Dr. Aquino added that she would testify if the court ordered her to do so. The court asked Toscano if she authorized Dr. Aquino "to testify as to the patient information she has regarding your daughter." Toscano replied that she did. The court told Dr. Aquino that she had the authority of the

conservator, so Toscano could proceed to question her. Fenske posed no objection; instead, he stated: "there's technically no privilege in these proceedings under the Evidence Code. It's a recognized exception."[2] Dr. Aquino testified.

B. *Analysis*

Under Evidence Code section 911, persons called as witnesses must testify unless they have a statutory privilege not to do so. Evidence Code section 1014 codifies the psychotherapist-patient privilege, providing in relevant part: "[T]he patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by: [¶] (a) The holder of the privilege. [¶] (b) A person who is authorized to claim the privilege by the holder of the privilege. [¶] (c) The person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure." Evidence Code section 993 defines " 'holder of the privilege' " to include a "conservator of the patient when the patient has a . . . conservator." (*Id*., subd. (b).)

Evidence Code section 912 provides that "[o]nly the 'holder' of a privilege may waive" it. (*Mavroudis v. Superior Court* (1980) 102 Cal.App.3d 594, 602.) Subdivision (a) of Evidence Code section 912 "specifies two ways the holder of a privilege may

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[2] Fenske did not identify the exception to which he referred.

waive the privilege. One way is by disclosing a significant part of the communication. . . . [¶] The second way is by consenting to disclosure. As to consent, [Evidence Code] section 912, subdivision (a) provides: '. . . the right of any person to claim a privilege provided by Section . . . [1014 (psychotherapist-patient privilege)] . . . is waived with respect to a communication protected by such privilege if any holder of the privilege . . . has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement . . . indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (*Hiott v. Superior Court* (1993) 16 Cal.App.4th 712, 719.)

We review a ruling admitting evidence for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.) "An abuse of discretion occurs when, in light of applicable law and considering all relevant circumstances, the court's ruling exceeds the bounds of reason. [Citations.]" (*North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 285.)

Toscano, Katrina's conservator, called Dr. Aquino to testify. As conservator, Toscano was the " 'holder of the privilege' " (Evid. Code, § 993, subd. (b)), who could waive it (*id.*, § 912, subd. (a)). Toscano also was "a person authorized to permit disclosure" (*id.*, § 1014, subd. (c)). Toscano expressly authorized Dr. Aquino to testify as to patient information regarding Katrina. The trial court did not abuse its discretion by implicitly concluding (1) Toscano thus "otherwise instructed" (*ibid.*) Dr. Aquino not to claim the psychotherapist-patient privilege, and (2) Toscano waived the privilege by consenting to disclosure. Katrina cites no

case holding that a conservator who may otherwise waive the psychotherapist-patient privilege cannot do so merely because the conservator and conservatee are opposing parties in a conservatorship proceeding.[3]

DISPOSITION

The order is affirmed.
NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LEIS, J.*

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[3] Inasmuch as the trial court properly found that Toscano was authorized to waive the psychotherapist-patient privilege, Fenske did not provide ineffective assistance of counsel by failing to object to Dr. Aquino's testimony. (Cf. *People v. Diaz*, *supra,* 3 Cal.4th at p. 562 [trial counsel not required to make futile objection].)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.